92-1486

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDDIE J. ADAMS, and the other named petitioners,

Petitioners

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where federal employees seek to challenge the actions of a federal agency that is not their employer agency, on a matter relating to their pay, must they bring those claims against their employer agency, even when the employer agency has no authority to address the claims?

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OPINIONS BELOW

The United States Claim Court opinion in this case is reported at Adams v. United States, 20 Cl.Ct. 542 (1990).

The United States Federal Circuit Court of Appeals opinion is reported at Adams v. United States, 979 F.2d 840 (1992), rehearing den'd, _____ F.2d ____ _ (1992).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this Petition because:

a. The Federal Circuit Court of Appeals sought to be reviewed was decided on November 3, 1992;

b. The Federal Circuit Court of Appeals denied Petitioners' Request for Reconsideration on December 1, 1992.

c. This Court has jurisdiction to review the Federal Circuit Court of

Appeals judgment by writ of certiorari under 28 U.S.C. 1254 (1988).

Statutes Relied Upon

The following statutes are set out in full in the Appendix.

The Administrative Procedures Act, 5 U.S.C. sec. 551, 553 (1988).

Prevailing Wage System Act of 1972, 5 U.S.C. sec. 5343(1988).

Supplemental Appropriations Act of 1982, P.L. 97-257

Civil Service Reform Act, 5 U.S.C. sec. 7103;7121 (1988).

The Tucker Act, 28 U.S.C. 1491 (1988).

STATEMENT OF THE CASE

The Claims Court dismissed Petitioners claims for back pay on the grounds that it lacked jurisdiction.

The Federal Circuit Court of Appeals affirmed and Petitioners now seek certiorari to review that decision.

Petitioners are former and current employees of the North Pacific Division of the Corps of Engineers. As such, their wages are governed by the Prevailing Wage System Act of 1972, Pub. L. No. 92-392, 86 Stat. 564, codified as amended at 5 U.S.C. sec. 5341-5349 (1988). They are also members of a union, the United Power Trades Organization (UPTO). UPTO and the Corps were parties to collective bargaining agreements in 1982, 1985, and 1988.

In 1982, Congress amended the prevailing wage system to alleviate a growing disparity between the wages of Corps employees and other federal employees doing comparable work for other agencies. Supplemental

Appropriations Act of 1982, Pub. L. No. 97-257, 96 Stat. 832 (the 1982 Amendment). The 1982 Amendment charged the Department of Defense Wage Fixing Authority (DODWFA) with the responsibility of setting wages of Corps employees in a manner consistent with 5 U.S.C. 5343.

Under the Prevailing Wage System, the wage fixing authority conducts surveys to determine appropriate wages. 5 U.S.C. 5343. In addition, employees are to be paid certain premium pay for seniority, overtime, environmental hazards, and working swing or night shifts. Id. The premium pay rates are not determined by the wage survey, but are set by statute. Id. However, the DODWFA determined that Corps employees were not entitled to certain premium pay.

Petitioners have sought review of the DODWFA's decision through several forums. Petitioners first sought review through UPTO's grievance procedure with the Corps. At arbitration, the arbitrator ruled in favor of the Union. However, on appeal, the Federal Labor Relations Authority (FLRA), ruled that the arbitrator lacked authority to rule on this issue. The FLRA ruled that the 1982 Amendment gave the DODWFA, and not the Corps, authority to determine wages. Consequently, the grievance procedure between the Union and the Corps was not the proper forum for resolving this dispute. United Power Trades Organization and Corps of Engineers,21 F.L.R.A. 501 (1986).

In 1987, the Union sought to negotiate the premium pay issue through the collective bargaining process. The F.L.R.A. again ruled that this issue could be addressed through the

collective bargaining process. Frustrated in their efforts to challenge DODWFA's actions through collective bargaining, Petitioners, as individuals brought this action in the Claims Court.

The Petitioners suit included two claims. First they claimed that DODWFA acted contrary to law in denying them premium pay mandated by 5 U.S.C. 5343. Second, they claimed changing the procedures for computing wages constituted rules as defined under 5 U.S.C. 551. Under 5 U.S.C. sec. 5343(c), such rules must be promulgated through rulemaking consistent with the Administrative Procedures Act, 5 U.S.C. sec. 553 (1988). It failed to do so, and consequently, its new rules were void. Petitioners did not allege that the Corps violated any law, regulation, or contract provision. Although the

Petitioners' claims were against the DODWFA and not the Corps, the Claims Court ruled that the sole forum for resolving these complaints was the grievance procedure agreed to between the Corps and the Petitioners' Union.

On appeal, the Federal Circuit affirmed the Claims Court. In so doing, it reasoned that these were pay matters and as such, must be brought against the employer, the Corps. In so ruling, the Court recognized that this left the Petitioners with no effective forum to hear their claims. Petitioners' filed a timely Petition for Reconsideration which was denied.

Jurisdiction of Claims Court

The United States Claim Court had jurisdiction to hear this claim under the Tucker Act, 28 U.S.C. 1491(a)(1) (1988).

ARGUMENT

I. THE COURT OF APPEALS DECISION IS INCONSISTENT WITH DECISIONS OF OTHER CIRCUITS AS WELL AS ITS OWN EARLIER DECISIONS.

The issue in this case is whether the Claims Court has jurisdiction to hear federal employees' claims against a wage fixing authority when that authority is independent of the workers' employing agency. The Federal Circuit ruled that because these claims are related to pay, they must be brought against the employer, and consequently, through the grievance procedure agreed to between the workers' union and their employer. The Court so held even though the employer had no power to address the workers' claims.

Before this case, no federal court has ever held that pay matters must be brought against the employing agency.

To so hold, is to effectively deprive federal employees the right to challenge unlawful actions of OPM, the President, and a myriad of other agencies.

I.

The Court held that Appellants' pay claims "can only be brought against their employer, the Corps." Slip Op. at 5. The Court rejected Appellants argument that these claims were brought against the DODWFA and not the Corps. "Irrespective of who determines the wage rate, these pay claims must be brought against the employer." Id. The Court cites no authority for this holding and none exists. Rather, several cases recognize that federal employees' pay disputes are not necessarily between employees and their employer-agency.

Other circuits have recognized that federal employees may properly bring

claims against non-employer agencies. See e.g, American Fed'n of Gov't Employees v. OPM, 821 F.2d 761 (D.C. Cir. 1987) (Federal employees, through their union, sued OPM to challenge OPM's method of determining overtime compensation under Fair Labor Standards Act, 29 U.S.C. sec. 201 et seq): Bolden v. Blue Cross & Blue Shield, 848 F.2d 201 (10th Cir. 1988) (Federal employees sued OPM and others to challenge OPM's decision to adopt cut-off date for refunds from health benefit plan's reserve account); Anderson v. Hodel, 899 F.2d 766 (9th Cir. 1990) (Bureau of Reclamation employee sued OPM, Secretary of the Interior, as well as employer agency for lead agency's failure to conduct proper wage survey under 5 U.S.C. 5341 et seq. Held: filing grievance against employer would have

been futile and hence unnecessary).

The Federal Circuit has also recognized that federal employees may bring pay claims against the President. American Fed'n of Gov't Employees v. Reagan, 806 F.2d 1034 (Fed. Cir. 1986). In Reagan, federal employees, both individually and through their unions, challenged President Reagan's alternative pay plan authorized under the Federal Pay Comparability Act, 5 U.S.C. 5301 et seq. The Claims Court had jurisdiction to hear these pay claims brought, not against the Plaintiffs' employer-agencies, but against the President. Id.

Similarly, federal employees have brought actions against the Office of Personnel Management, alleging OPM had violated federal law. National Treasury Employees Union v. Horner, 869 F.2d 571

(Fed. Cir. 1989). In Horner, federal employees and their union challenged OPM's failure to make automatic adjustments in the special rate employee schedule, pursuant to 5 U.S.C. sec. 5003(d) and 5 U.S.C. sec. 5305. Again, the Federal Circuit did not require the employees to bring these claims against their employer-agencies.

The Claims Court has also recognized that federal employees may bring pay claims against non-employer agencies. Averi v. United States, 23 Cl.Ct. 127 (1991). In Averi, radio technicians employed by the Voice of America (VOA) sought to challenge a pay plan established by OPM under 5 U.S.C. 5343. This is the very statute Appellants here allege the DODWFA has violated. The Claims Court expressly recognized the futility of bringing such

claims against employer-agencies:

> While plaintiffs' briefs also attack the acts and omissions of VOA, their complaint actually concerns OPM's actions. Under the prevailing rate pay statute, OPM has authority to designate a lead agency for a wage area to establish appropriate wage schedules for prevailing rate employees after conducting wage surveys and analyzing wage survey data. . . . VOA must apply the rates established by OPM. VOA, therefore, does not have the power to redress plaintiffs complaints.

Id. at 129, n.4.

All of the above case present situations in which bringing claims against an employer-agency was inappropriate because the employer-agency was powerless to address the employees' claims. In none of the above cases were the employees nonetheless required to pursue their claims against the employer agency. Rather, the employees were properly allowed to bring

their claims against the party who was the alleged wrong-doer.

Here, the Federal Circuit recognizes that the employer, the Corps cannot address the Plaintiffs' claims. Slip Op. at 6. The Appellants did not allege any wrongdoing by the Corps. Rather, Appellants claims are that DODWFA has erred in establishing the pay schedule. Nonetheless, the Court holds that Appellants can only bring their claims against the Corps. As the above cases show, this holding contradicts established law in every Circuit that has faced this situation.

The Court of Appeals decision in this case creates a split among the circuits that warrants review by the Court. In every other circuit, federal employees can challenge the actions of non-employer agencies. However, they

are now precluded from bringing such actions in the Court of Claims. Thus, they are precluded from bringing any such claims involving over $10,000. See 28 U.S.C. sec. 1346 (a) (District Court jurisdiction limited to claims under $10,000.) This will create further confusion among the circuits as judges are faced with choosing between long accepted principles and the unsupported conclusions of the Federal Circuit.

II.

The scope of Federal Circuit's decision in this case is not limited to the employees in this case. In ruling as it did, the Court has foreclosed all federal employees from pursuing claims against non-employer agencies if those claims are related to pay matters. In the Federal Wage System, there are 364,906 employees. Federal Civilian

Work Force Survey, November, 1992. All of these employees' wages are set by OPM or another lead agency. Apparently, these lead agencies are now immune from any challenge to their decisions. Because the Court concluded that all pay related claims must be brought against the employer-agency, it necessarily precluded any claims against a non-employer agency. Under the Court's reasoning, employees can only bring such claims against their employer, even where the employer lacks the authority to resolve those claims.

II. THE OPINION BELOW IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF CONTRACT LAW AND IS INCONSISTENT WITH THE CIVIL SERVICE REFORM ACT.

Apparently, the Federal Circuit relied on the Civil Service Reform Act in finding that the Claims Court lacked jurisdiction. The CSRA defines the

process for collective bargaining between federal employees and their employer agency. The CSRA broadly defines "grievance" as "any matter relating to employment." 5 U.S.C. 7103. Further, under the CSRA, all grievances, unless specifically excluded, must be brought through a negotiated grievance procedure. 5 U.S.C. 7121. Consequently, a grievance cannot be pursued through the Claims Court if the parties have agreed to a grievance procedure.

Petitioners accept this reasoning. However, the Court errs when it extends the reach of a grievance procedure to those matters over which the employer has no control. Here, the grievance procedure is part of a collective bargaining agreement between the Petitioners' Union and the Corps. Like

all contracts, that collective bargaining agreement binds the Union and the Corps to its terms. However, the DODWFA is not bound by the terms of the collective bargaining agreement. Nor does the FLRA have the power to enforce an arbitrator's decision against the DODWFA. Simply put, the grievance procedure envisioned by the CSRA can resolve disputes between employees and their employer. It cannot resolve disputes between employees and non-employer agencies.

Of course, the Court did not say that these claims must be solved through the grievance procedure. In fact, it recognized that this was not possible. Rather, it ruled that the CSRA removed these claims from the jurisdiction of the Claims Court. This is contrary to law. The Claims Court has jurisdiction

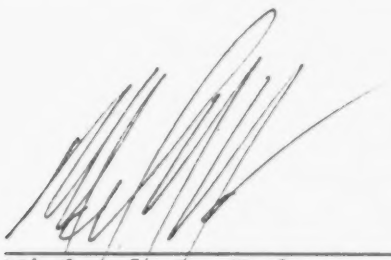
to hear all money claims against the government. 28 U.S.C. 1491. The CSRA limits that jurisdiction to the extent a claim may be brought through a grievance procedure. However, where the dispute is against an agency that is not a party to the collective bargaining agreement, the Claims Court jurisdiction must remain.

The Court's insistence that these claims must be against the employer, the Corps, is simply erroneous. The CSRA has no provision suggesting such a limitation. Neither does the Prevailing Wage System. Neither does the Administrative Procedures Act nor the Tucker Act. As noted above, no other circuit has ever recognized such a limitation--although several circuits, including the Federal Circuit have recognized employees' claims against a variety of non-employer agencies.

Despite the well-established practice of allowing federal employees to challenge the unlawful acts of non-employer agencies, the Federal Circuit, in this case, refused to recognize such a challenge. It also refused to cite any authority for its conclusion, statutory or otherwise.

CONCLUSION

For the reasons expressed above, the Appellants respectfully request the panel reconsider its decision in this case.



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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5137,-5143

EDDIE J. ADAMS and the other named plaintiffs-appellants,

Plaintiffs-Appellants,

v.

UNITED STATES

Defendant-Appellee.

DECIDED: November 3, 1992

Before ARCHER, LOURIE, and RADER, Circuit Judges.

LOURIE, Circuit Judge.

Eddie J. Adams et al., appeal from the judgment of the United States Claims Court dismissing their complaint for lack of subject matter jurisdiction. Adams v. United States, 20 Cl. Ct. 542 (1990). Because resolution of the

appellants' pay claims may only be pursued through the grievance procedure provided in the governing collective bargaining agreement, we affirm.

BACKGROUND

Appellants are present and former employees of the North Pacific Division of the U.S. Army Corps of Engineers (Corps), whose wages are and were governed by the Prevailing Rate Systems Act of 1972, Pub. L. No. 92-392, 86 Stat. 564, codified as amended at 5 U.S.C. secs. 5341-5349 (1988). During all times relevant to their complaint, appellants are or were members of a union. The union and the Corps were parties to consecutive collective bargaining agreements executed in 1982, 1985, and 1988.

In 1982, Congress amended the prevailing rate system through the Supplemental Appropriations Act of 1982, Pub. L. No. 97-257, 96 Stat. 818, 832 (the 1982 Amendment), in order to alleviate the disparity between the wages of Corps employees and those performing comparable work in other agencies. The 1982 Amendment charged the Department of Defense Wage Fixing Authority (DODWFA) with the responsibility for setting wages of Corps employees consistently with that of employees of the Department of Energy and Defense. 5 U.S.C. sec. 5343 note (1988). Pursuant to the new rate schedules established by the DODWFA under the authority of the 1982 Amendment, the Corps discontinued

payment of certain "premium pay" provided under 5 U.S.C. sec. 5343 (1988).

Appellants, represented by the union, sought resolution of their pay dispute in 1985 and 1987 through the grievance procedurestipulated in the then-governing collective bargaining agreement.[1] After failing to obtain

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*The union filed a grievance against the Corps in 1985, alleging that the Corps had violated the 1982 agreement in discontinuing payment of shift differential. At arbitration, the arbitrator ruled in favor of the union and awarded the affected employees backpay for the shift differential. On appeal to the Federal Labor Relations Aughority (FLRA), the FLRA set aside the arbitrator's award. The FLRA concluded that the 1982 Amendment prohibited payment of shift differential to Corps employees. 21 F.L.R.A. 501 (1986).

In a separate action brought in 1987, the union also appealed the negotiability of its premium pay claims to the FLRA. The FLRA, in concluding that the 1982 Amendment prohibited the

satisfaction of their claims through the grievance process, appellants filed suit in the U.S. Claims Court in 1990, seeking premium pay plus interest, retroactive to May 29, 1983, including environmental hazard pay, seniority pay, and night shift differential pay. Following our decision in Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990) (in banc), cert. denied, ____ U.S. ____, 111 S. Ct. 46 (1990), the Claims Court dismissed appellants' complaint for lack of jurisdiction. The court concluded that the grievance procedure of appellants' collective bargaining

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payment of premium pay to Corps employees, determined that such pay cliams were not appropriate for negotiation because they were contrary to law. 30 F.L.R.A. 639 (1987).

agreement constituted the exclusive remedy for their pay claims. Because the governing agreement did not exclude from the grievance procedure the pay claims at issue, the court determined it lacked jurisdiction over appellants' complaint. We review de novothe correctness of the Claims Court's demissal for lack of subject matter jurisdiction. Aamodt v. United States, Nos. 91-5101 and 91-5102, slip op. at 2 (Fed. Cir. Sept. 10, 1992).

DISCUSSION

Section 7121(a) of the Civil Service Reform Act of 1978 requires that all collective bargaining agreements contain "grievance procedures for the settlement of grievances." 5 U.S.C. sec. 7121(a)(1) (1988). In addition,

the statute provides that "[a]ny collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement." 5 U.S.C. sec. 7121(a)(2) (1988). In Muniz v. United States, 972 F.2d 1304 (Fed. Cir. 1992), this court reaffirmed and expounded upon its holding in Carter. The court in Muniz held that "grievances which are cognizable under section 7121(a)(1) and are not explicitly and unambiguously excluded by the parties under section 7121(a)(2) from the agreement's compulsory grievance and arbitration procedures are exclusively subject thereto." Id. at 1319. The collective bargaining agreements between the Corps and the union governed

the terms and conditions of appellants' employment. Article 17 of the 1988 agreement, which was in effect when the instant suit was commenced, delineates the grievance procedure to be followed for the resolution of complaints arising out of the agreement. Section 17.3 provides in pertinent part:

> 17.3 - This negotiated grievance procedure shall be the exclusive procedure for resolving complaints included in its coverage. [Emphasis added.] Nothing provided for in this Article shall restrain employees who have a right of action in State or Federal Court which does not require th exhaustion of a grievance procedure. Questions involving application of published agency policies, provisions of law, regulations of the Department of the Army Corps of Engineers or regulations of appropriate authorities outside the Department of the Army shall not be subject to the grievance procedure. However,

> the Union shall have the right to grieve actions taken by the Division as a result of Division interpretation of any of the above mentioned regulations.

Appellants assert that under section 17.3, all disputes regarding the application of statutes are expressly excluded from the coverage of the agreement. Accordingly, they argue that their complaint is expressly excluded from the agreement because it raises a question concerning the statutory application of 5 U.S.C. sec. 5343 by the DODWFA. We are unpersuaded by appellants' attempt to characterize their claims in that manner. A similar contention was rejected by the court in Muniz, which recognized that acceptance of such a view would "leave[ ] the dispute resolution process in the

agreement in shambles, because any issue in grievance or arbitration apparently could be removed from the process at any time by an alleged need to construe or apply a law or regulation." Muniz, 972 F.2d at 1310.

The gravamen of appellants' complaint is that the Corps improperly discontinued the payment of premium pay pursuant to the wage schedules set by the DODWFA under the 1982 Amendment. Their claims are essentially claims for pay, and as such, can only be brought against their employer, the Corps. The fact that the DODWFA set the wage rate does not take this case out from the Muniz rule. Irrespective of who determines the wage rate, these pay claims must be brought against the

employer and they are subject to the collective bargaining agreement. Thus, these claims must be pursued according to the grievance procedure set out in the governing agreement, unless they are explicitly and unambiguously excluded therefrom.

We conclude that because appellants' pay claims are not explicitly and unambiguously excluded from the grievance procedure, and are not otherwise statutorily excluded from its coverage, the Claims Court lacks jurisdiction to hear their complaint. In so holding, we are not unmindful of the "Catch-22" predicament facing the appellants, who maintain that the effect of the decisions of the Claims Court and the FLRA is to leave them without a

forum in which to bring their claims. However, we must adhere to the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists . . . ." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988).

CONCLUSION

The Claims Court's decision to dismiss the complaint for lack of jurisdiction is affirmed.

AFFIRMED

IN THE UNITED STATES CLAIMS COURT

No. 749-88C

(Filed: May 31, 1990)

EDDIE J. ADAMS, et al,

Plaintiffs,

v.

THE UNITED STATES
Defendant.

Civilian pay; premium pay; collective bargaining the Civil Service Reform Act Prevailing Rate Systems Act; Claims Court jurisdiction.

Michael J. Tedesco, Portland, Oregon, for plaintiffs.

Hilary A. Stern, Washington, D.C., with whom were Assistant Attorney General Stuart M. Gerson, Director David M. Cohen, and Assistant Director Stephen J. McHalle, for defendant.

OPINION

LYDON, Senior Judge:

This case is before the court on the government's motions to dismiss plaintiffs' complaint for lack of subject matter jurisdiction, pursuant to RUSCC 12(b)(1), and to suspend

proceedings in this suit pending resolution of the motion to dismiss, or in the alternative, for an enlargement of time in which to respond to plaintiffs' motion for summary judgment.

Plaintiffs are 288 present and former prevailing rate employees of the North Pacific Division of the United States Army Corps of Engineers (Corps).[1] Plaintiffs filed a complaint in this court on December 28, 1988, seeking premium pay plus interest, retroactive to May 29, 1983, pursuant to sec. 5343 of the Prevailing Rate Systems Act of

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[1]The concept of the federal "prevailing rate" pay system is based on the policy that "rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest and be based on principles that . . . the level of rates of pay will be maintained in line with prevailing levels for comparable work [in private industry] within a local wage area...." 5 U.S.C. secs. 5341, 5343 (1988).

1972 (prevailing rate act), 5 U.S.C. secs. 5341-49 (1988), which is part of the Federal Wage System, 5 U.S.C. secs 5301 et seq.[2] On October 31, 1989, plaintiffs filed a motion for summary judgment on the issue of liability. The government thereafter filed the present motion to dismiss for lack of jurisdiction on January 29, 1990. Oral argument was held on May 21, 1990. Defendant has not, as yet, responded to plaintiffs' motion for summary judgment.

The governments's motion to dismiss

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[2]Plaintiff's complaint also seeks injunctive relief in the form of an order directing the Department of Defense Wage Fixing Authority (DODWFA)) to cease violating the requirements of 5 U.S.C. sec. 5343. This court has no jurisdiction to grant injunctive or declaratory relief, however, except as conferred by statute. United States v. King, 395 U.S. 1, 3 (1963); Berdick v. United States, 222 Ct. Cl. 94, 100, 612 F.2d 533, 536 (1979); Curry v. United States, 221 Ct. Cl. 741, 747, 609 F.2d 980, 983 (1979).

plaintiffs' complaint for lack of subject matter jurisdiction is premised on the argument that plaintiffs' exclusive remedy for their pay claims is confined to the terms of their union's collective bargaining agreement. Plaintiffs oppose the motion to dismiss, contending that their pay claims cannot be resolved through the grievance procedure of the collective bargaining agreement.

Plaintiffs' pay claims under the prevailing rate act include environmental hazard pay (sec. 5343(c)(4)), seniority pay (sec. 5343(e)), and night shift differential pay (sec. 5343(f)). Plaintiffs refer to all three of these pay claims as "premium pay" to distinguish them from "base wages" determined through wage surveys, which plaintiffs now assert

they do not seek, although their complaint as filed seeks recovery for "[A]ll unpaid wages . . . ."

FACTS

The Federal Wage System, Pub. L. No. 92-392, was implemented in 1972, and it provides generally for federal blue collar workers to be paid wages comparable to wages paid for similar positions in the private sector. See 5 U.S.C. sec. 5343; S. Rep. No. 791, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. CODE CONG & ADMIN. NEWS 2980, 2981-82. During the 1970's plaintiffs' wages were determined under the Federal Wage System. In 1979, Congress capped the wages of most federal employees, including those in the Federal Wage System. Certain employees of the Department of the Interior (DOI) and the Department of Energy (DOE) were allowed

to continue to bargain their wages, however, with the result that, by 1982, DOI and DOE employees were earning higher base wages than similarly situated Corps employees. To rectify the situation, Congress passed the Supplemental Appropriations Act of 1982 (the 1982 amendment), amending 5 U.S.C. sec. 5343 of the CSRA.[3] The 1982

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[3]The legislative history of the 1982 amendment reflects congressional recognition of the pay disparity problem:

> The Committee has been informed that certain Corps of Engineers power plan operational personnel are paid less than personnel of other agencies doing comparable jobs in nearby locations. The Committee believes that all Federal employees should receive comparable compensation for performing comparable work. Therefore, the Committee has included a provision in the Bill that would remove the inequity.

amendment provided that wages of Corps employees would no longer be determined by surveying private sector wages, but rather by surveying comparable DOI and DOE positions.[4]

H.R. Rep. No. 673, 97th Cong., 2d Sess. 83 (1982).

[4]The 1982 amendment reads as follows:

> Without regard to any other provision of law limiting the amounts payable to prevailing wage rate employees, United States Army Corps of Engineers employees paid form Corps of Engineers Special Power Rate Schedules shall be paid, beginning the effective date of each annual wage survey in the region after the date of enactment of the Act, wages as determined by the Department of Defense Wage Fixing Authority to be consistent with the wages of the Department of Energy and Department of the Interior employees performing similar work in the corresponding area whose rates are established in accordance with Section 9(b) of Public Law 92-392 or Section 704 of

The 1982 amendment authorized the Department of Defense Wage Fixing Authority (DODWFA) to set Corps employees' wages.[5] The DODWFA

Public Law 95-454.

[5]Defendant submitted to the court a letter from the Department of Defense describing the impact of the 1982 amendment on Corps employees' wages:

> Corps of Engineers employees each [received] a raise in base pay of over $4,900 per annum, a 19% increase. Holiday premium pay was increased to 300%. This placed the Corps of Engineers employees on an equal pay basis with employees who were in the Department of Energy and Interior performing similar work. Similarly, shift differential for the Corps of Engineers employees was discontinued because employees in the other two agencies were not paid a differential for shift work. Adding shift differential to the increases granted by [the Supplemental Appropriations Act] would cause the Corps of Engineers employees to be paid from 7.5 to 10% above counterpart employees in

apparently interpreted the 1982 amendment as removing Corps employees from the Federal Wage System, and thereby authorizing the DODWFA to alter not only the method of computing base wages, but the method of computing premium pay as well.

Plaintiffs contend that the DODWFA has incorrectly interpreted the 1982 amendment as removing Corps employees from the Federal Wage System. Plaintiffs argue that the purpose and effect of the 1982 amendment was not to remove Corps employees from the Federal

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> Energy and Interior, i.e., the pay inequities [,to which the 1982 amendment was directed,] would be recreated.

It would appear from this letter that Corps employees did receive some degree of premium pay albeit it was not severable as such when their pay structure was reconstructed as a result of the 1982 amendment.

Wage System, but rather to remove the 1979 pay cap on base wages, and thereby restore parity between base wages of Corps employees and base wages of DOI and DOE employees performing similar work. Plaintiffs insist that their interpretation of the 1982 amendment signifies that plaintiffs are still entitled to receive premium pay as set by statute under 5 U.S.C. sec. 5343.

The parties agree that during all times relevant to their complaint, plaintiffs are or were members of a union, the United Power Trades Organization (the Union). The Union and the Corps were parties to consecutive collective bargaining agreements executed in 1982, 1985, and 1988, each agreement lasting three years. These agreements were negotiated pursuant to the Federal Service Labor-Management

Relations statute (FSLMR), 5 U.S.C. secs. 7101-7135 (1988), which is part of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. sec. 7101 et seq.[6]

Article 6 of the 1988 collective bargaining agreement currently in force states that "[b]oth parties of this Agreement have the responsibility of conducting their negotiations in good faith and otherwise in such a manner as will further the purpose of Title VII, Civil Service Reform Act of 1978 (CSRA)..." Title VII of the CSRA

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[6]Section 7121(a) of the CSRA requires that all collective bargaining agreements contain grievance procedures, and that such procedures "shall be the exclusive procedures for resolving grievances that fall within its coverage." This section further provides that "[a]ny collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement." 5 U.S.C. sec. 7121(a).

"established the rules by which the Federal Government would conduct its labor management relations in all dealings with federal employees and organizations representing such employees." Phillips v. United States, 11 Cl. Ct. 155, 156 (1986).

Article 6 also provides, in section 6.2 that "[s]ubjects appropriate for negotiations are conditions of employment, as defined in Section 7103(a)(14) of Title VII, CSRA." Section 7103(a)(14) defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions...." 5 U.S.C. sec. 7103(a)(14).

Article 17 of the current (1988) collective bargaining agreement governs

the grievance procedure. Nowhere in Article 17 or elsewhere in the provisions of the collective bargaining agreement is the term "grievance" defined, but section 17.3 excludes, inter alia, the following matters from the scope of the grievance procedure: "Questions involving application of published agency policies, provisions of law, regulations of the Department of the Army Corps of Engineers or regulations of appropriate authorities outside the Department of the Army shall not be subject to the grievance procedure."[7]

Section 17.3 of Article 17 also

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[7]The above-quoted provision is from the 1988 collective bargaining agreement. Section 17.3 of the 1982 agreement contained slightly broader language: "Questions involving interpretation or applications of published Agency policies, provisions of law. . . ." (emphasis added).

states that this grievance procedure "shall be the exclusive procedure for resolving complaints included in its coverage." This section further provides that "[n]othing provided for in this Article shall restrain employees who have a right of action in State or Federal Court which does not require the exhaustion of a grievance procedure."

The 1982 collective bargaining agreement specifically provided, in Articles 19 and 20 respectively, that Corps employees were entitled to receive, inter alia, shift differential pay and environmental hazard pay, which are two of plaintiffs' three pay claims. As a result of the 1982 amendment, however, the provisions for shift differential and environmental pay do not appear in the 1985 or the 1988 versions of the collective bargaining

agreement. It should be noted, however, that neither of these pay matters is specifically excluded from the grievance procedure in the 1985 or 1988 collective bargaining agreements. See Carter v. Gibbs, No. 88-1576, slip op. at 9-10 (Fed. Cir. Mar. 30, 1990)(en banc).

On behalf of plaintiffs, the Union has tried to resolve the premium pay claims at issue here through the grievance procedure of the collective bargaining agreement. In 1986, the Union filed a grievance against the Corps when the Corps stopped paying night shift differential to Corps employees. The Corps appealed the arbitrator's decision that the Corps had violated the terms of the collective bargaining agreement by discontinuing payment of night shift differential. The Corps' appeal to the Federal Labor

Relations Authority (FLRA) resulted in the FLRA setting aside the arbitrator's award, on the basis that the 1982 amendment required Corps employees to be paid wages consistent with wages paid to DOI and DOE employees. Since the DODWFA had determined through wage surveys that DOI and DOE employees were not paid a shift differential, the FLRA concluded that the 1982 amendment prohibited the payment of shift differential to Corps employees. See 21 FLRA 66 (1986).

In 1987, the Union appealed the negotiability of shift differential, premium pay and environmental pay before the FLRA, which are the three pay claims at issue here.[8] The FLRA concluded that

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[8]Plaintiffs characterize seniority pay, as well as shift differential and environmental pay, as "premium pay" in their reply brief, and the court will treat seniority pay as premium pay for the purposes of this motion to dismiss.

the 1982 amendment prohibited payment of the premium pay sought by plaintiffs, i.e., shift differentials, premium pay (presumably seniority pay) and environmental pay, and therefore such premium pay matters were outside the duty to bargain and not negotiable since they are contrary to law. See 30 FLRA 77 (1987).

DISCUSSION

In support of its motion to dismiss, the government contends that plaintiffs' claims are "pay matters," which are not excluded from the grievance procedure under Section 17.3. The government argues that, because "pay matters" are not excluded from the grievance procedure, plaintiffs' pay claims must be resolved exclusively

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See Plaintiff's Response to Defendant's Motion to Dismiss, at 1.

through the grievance procedure, and therefore the court lacks jurisdiction over plaintiffs' complaint. The government supports this point by citing sec. 7121(a)(1) of the CSRA, which states that where a collective bargaining agreement provides for grievance procedures, "the procedures shall be the exclusive remedy for resolving grievances which fall within its coverage."

The government also cites two cases in which the Federal Circuit has held that sec. 7121(a)(1), the exclusive remedy provision of the CSRA, precludes any remedy other than the grievance procedure for resolving grievances that arise under collective bargaining agreements that govern labor-management relations between federal employers and federal employees' unions. Carter,

supra, slip op. at 16; Harris v. United States, 841 F.2d 1097, 1100 (Fed. Cir. 1988). The government relies heavily on Carter and Harris, and also cites two Claims Court cases that followed Harris' rationale, to support its position that plaintiffs' complaint should be dismissed for lack of jurisdiction. See Adkins v. United States, 16 Cl. Ct. 294 (1989); Fahy v. United States, 14 Cl. Ct. 470, aff'd, 864 F.2d 148 (Fed. Cir. 1988), cert. denied, 109 S. Ct. 3197 (1989).

Plaintiffs characterize their complaint as seeking judicial review of the DODWFA's interpretation of the 1982 amendment, which amended 5 U.S.C. sec. 5343, the provision of the prevailing rate act under which plaintiffs' pay claims are brought. Plaintiffs allege that the DODWFA has improperly

interpreted the 1982 amendment as removing Corps employees from the Federal Wage System. Plaintiffs contend that DODWFA's actions in eliminating premium pay for Corps employees are contrary to the statutorily mandated pay rates set forth in 5 U.S.C. sec. 5343. Plaintiffs also challenge the DODWFA's actions in failing to follow the rulemaking requirements of the Administrative Procedures Act (APA), 5 U.S.C. secs. 551 et seq., in establishing wage-setting procedures. 5 U.S.C. sec. 553. Plaintiffs argue that, even if the DODWFA has correctly interpreted the 1982 amendment as removing Corps employees from the Federal Wage System, the DODWFA has violated the APA rulemaking requirements in setting premium pay rates. Plaintiffs seek premium pay retroactive

to May 29, 1983, and they also seek an injunction to sop the DODWFA from violating the requirements of 5 U.S.C. sec. 5343. See supra note 2.

Plaintiffs challenge the government's argument that plaintiffs' exclusive remedy for their pay claims lies within the grievance procedure of plaintiffs' collective bargaining agreement. Plaintiffs advance two reasons why their pay claims fall outside the scope of the grievance procedure. First, plaintiffs argue that the government fails to recognize that a fairly broad range of matters are excluded from the grievance procedure: "Questions involving application of published agency policies, provisions of law, regulations of the Department of the Army Corps of Engineers or regulations of appropriate authorities

outside the Department of the Army shall not be subject to the grievance procedure." Plaintiffs contend that it would not be unreasonable to read their complaint as raising, inter alia, a question involving the application of a provision of law, i.e., the application of the prevailing rate act, 5 U.S.C. secs. 5341-49, and the 1982 amendment thereto.

Second, plaintiffs contend that since 1983, the Corps has consistently refused to bargain premium pay rates, and they cite 1986 and 1987 Federal Labor Relations Authority (FLRA) rulings which, plaintiffs claim, indicate that night shift and environmental pay rates cannot be bargained. Plaintiffs argue that, since premium pay rates are set by statute and cannot be bargained, their pay claims are outside the scope of the

collective bargaining agreement, and are not subject to the grievance procedure.

Defendant's motion to dismiss plaintiffs' complaint for lack of jurisdiction raises the issues of whether plaintiffs' pay claims are subject to the grievance procedure of the collective bargaining agreement, and if so, whether the avenue of relief available through the grievance procedure forecloses judicial review of these pay claims. These issues can best be resolved by an analysis of relevant case. law. Harris and Carter are two recent cases in which the Federal Circuit has struggled with the issue of whether the CSRA precludes judicial review of pay claims that are found to fall within the scope of the grievance procedure of a collective bargaining agreement.

I

In Harris, supra, the Federal Circuit addressed the issue of whether a federal employee was precluded by the terms of his union's collective bargaining agreement, from bringing his environmental differential pay (EDP) claim in federal district court. The EDP claim was premised on sec. 5343(c) of the prevailing rate act, as is plaintiffs' environmental hazard pay claim here. The parties in Harris agreed that environmental differential pay is an issue "suitable for collective bargaining." Harris, supra, 841 F.2d at 1100. The Harris court found that EDP claims are not excluded from the grievance procedure of the collective bargaining agreement, and therefore sec. 7121(a)(1) of the CSRA provides that the grievance procedure is the exclusive

reedy for such grievable claims. Although Harris argued that, prior to the CSRA, the Tucker Act provided a remedy for a prevailing rate employee's EDP claims, and that repeals by implication are not favored, the court rejected plaintiffs argument and held that the CSRA operates to repeal by implication the preexisting Tucker Act remedy, and to divest the district court of jurisdiction to consider plaintiffs EDP claim. The court based its decision in large part on the Supreme Court's reasoning in United States v. Fausto, 489 U.S. 439 (1988), which interpreted the comprehensive scheme of the CSRA as establishing Congress' intention to foreclose judicial review of adverse personnel actions for certain categories of federal employees, even though such a remedy had been previously available in

the Claims Court under the tucker Act, Fausto, supra, 484 U.S. at 448.

On March 30, 1990, the Federal Circuit, sitting en banc, reversed a prior panel decision in Carter v. Gibbs, 883 F.2d 1563 (Fed. Cir. 1989). Before reversal, Carter held that federal employees could bring overtime pay claims, under secs. 7 and 16(b) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. sec. 213, either through the grievance procedure of a collective bargaining agreement or in federal court. In reversing itself, the court noted that the parties agreed that plaintiffs' overtime pay claims were not excluded from the grievance procedure of the collective bargaining agreement. The court concluded that sec. 7121(a)(1), the CSRA's exclusivity provision, precluded plaintiffs from

obtaining judicial review of their FLSA overtime claims. Their exclusive remedy, the Federal Circuit held, resides in the grievance procedure of their union's collective bargaining agreement. As in Harris, plaintiffs' argument that repeals by implication are disfavored was rejected by the Federal Circuit; the court restated the question as "whether an additional exception to CSRA section 7121(a)(1)'s exclusivity provision should be implied[,]" and the court emphasized that "[t]he answer is no." Carter, supra, slip op. at 10.

Taking note of the Supreme Court's reasoning in Carter found that the CSRA's "integrated scheme of administrative and judicial review" compelled the conclusion that no exception to the CSRA's exclusivity procedure be implied. Carter, supra,

slip op. at 10 (quoting Fausto, supra, 484 U.S. at 445). In reaching this conclusion, the court turned to a recent Supreme Court decision, Karahalios v. National Federation of Federal Employees, 489 U.S. 527, 109 S.Ct. 1282 (1989). Citing Karahalios and Harris, the Federal Circuit observed that "while 'the collective bargaining mechanisms created by Title VII [of the CSRA] do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation,' . . . the agreement they negotiate with the government may." Carter, supra, slip op. at 9, quoting Karahalios, supra, 489 U.S. at ____, 109 S. Ct. at 1288 (citation omitted).

In analyzing the statutory scheme of the CSRA, the Federal Circuit in Carter noted that:

> "[e]ven where Congress expressly made exceptions to the otherwise exclusive bargained grievance procedures, [in sec. 7121(d),(e)(1),(f) of the CSRA] it only gave federal employees access to appellate judicial review; it did not ...allow de novo trials in the district courts.... Moreover, judicial remedies parallel to administrative ones are nowhere provided. At most, an aggrieved employee may choose statutory procedures or negotiated procedures, "but not both."

Carter, supra, slip op. at 11. The court reasoned that "[b]cause the CSRA vests the Federal Labor Relations Authority with exclusive authority to enforce a Union's statutory duty of fair representation, 'a parallel remedy in federal district court' cannot be implied." Carter, supra, slip op. at 11, quoting Karahalois, supra, 489 U.S. at ___, 109 S. Ct. at 1286. Furthermore, the Federal Circuit noted

that

> [i]n the judicial access provisions of the CSRA [sec. 7123(d)], only the Federal Labor Relations Authority can go to federal district court, and then only to petition for "appropriate temporary relief" from an unfair labor practice. . . . Even where Congress expressly made exceptions to the otherwise exclusive bargained grievance procedures, it only gave federal employees access to appellate judicial review; it did not...allow de novo trials in the district courts.

Carter, supra, slip op. at 11.

In this case, as the government points out, in light of the en banc decision in Carter, plaintiffs' attempt to distinguish Harris, on two bases, one, that it involved a "local, fact-specific issue," and two, that the parties in Harris agreed that EDP was a suitable topic for collective bargaining, is misplaced. The government also discounts plaintiffs'

reliance on Gahagan v. United States, 19 Cl. Ct. 168 (1989), which held that when a federal employee is seeking judicial resolution of his premium pay claim through judicial enforcement of a nationwide federal law, his claim will be considered by the court, even though it was subject to a purportedly "exclusive" grievance procedure under a collective bargaining agreement. Gahagan, supra, 19 Cl. Ct. at 174. The court in Gahagan relied heavily on the Carter decision as it stood before the en banc reversal. Gahagan distinguished Harris on the basis that the EDP claim in Harris involved local wage standards that did not apply to federal employees nationwide, as did the premium pay claims in Gahagan. Plaintiffs concede in their supplemental brief that the Federal Circuit largely overruled

Gahagan in reversing Carter. Plaintiffs insist, however, that Carter, as reversed, does not prevent plaintiffs from seeking judicial review of their non-grievable pay claims.

II

The Carter decision also undermines plaintiffs' position that their pay claims are outside the scope of the grievance procedure by contending that they have tried to resolve their night shift and environmental differential pay grievances through the grievance procedure of their union's collective bargaining agreement, but the FLRA ultimately ruled that such pay rates were set by statute and were not bargainable. Plaintiffs cite two FLRA decisions, 21 FLRA 66 (1986) and 30 FLRA 77 (1987), which have been discussed supra. Plaintiffs emphasized at oral

argument that, since these pay rates cannot be bargained, their pay claims fall outside the scope of the collective bargaining agreement, and therefore they cannot be subject to the grievance procedure.[9]

As the government pointed out at

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[9]Plaintiffs' counsel expressed concern at oral argument that, if Carter stands for the proposition that non-negotiable subjects of dispute are nonetheless exclusively confined to the grievance procedure, such a result would disturb and undermine many years of well-settled labor law principles governing labor agreements between private parties. While the court appreciates plaintiffs' position, at the same time the court recognizes that labor relations between the government and its employees are subject to congressional mandate, and therefore a useful analogy cannot always be drawn between the public and private sectors. Moreover, the court is cognizant of the fact that public sector labor law, including the FLSA, is currently experiencing "growing pains" not unlike the development of private sector labor law, including the National Labor Relations Board, that has taken place in the past fifty years.

oral argument, a distinction must be drawn between "grievability" and "negotiability." The court agrees with defendant that Carter stands for the proposition that, with regard to pay matters of the type at issue here, if such pay matters are not specifically excluded from the grievance procedure by the terms of the collective bargaining agreement, they are "grievances" within the meaning of 5 U.S.C. sec. 7103(a)(9) of the CSRA, and are therefore subject to resolution exclusively through the grievance procedure, even though the grievance procedure has resulted in a determination that the pay matters in dispute are non-negotiable. Stated another way, merely because employees are unsuccessful in their grievance endeavors does not, per se, entitle them

to bring suit in this court.[10]

In this case, plaintiffs' pay claims are not specifically excluded from the grievance procedure under Article 17 of the collective bargaining agreement and therefore the claims are "grievances" within sec. 7103(a)(9) of the CSRA. Accordingly, the exclusivity provision of the CSRA, sec. 7121(a)(1),

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[10]Section 7103(a)(9) of the CSRA defines "grievance" as follows:

> "[G]rievance" means any complaint-
> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning--
>
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment[.]

provides that the grievance procedure is the exclusive remedy for resolving plaintiffs' pay claims. See Carter, supra, slip op. at 9-10.

Plaintiffs admit that they have attempted to resolve their premium pay claims through the grievance procedure, citing the 1986 and 1987 FLRA decisions, supra. Plaintiffs argue, however, that since their pay claims were ruled non-negotiable by the FLRA, their pay claims are not within the duty to bargain, and are therefore outside the scope of the grievance procedure, and outside the scope of Carter.

Although plaintiffs' argument is not without logic, and plaintiffs' suggest said argument is based upon principles of labor law governing private sector labor relations, such suggestions, are not always analogous to

public sector labor relations, as the public sector is subject to other considerations involving the broad public interest, congressional and statutory concerns, etc. See sura note 9. The court feels that Carter represents a significant continuation of a trend in this area of the law, and accepts the Federal Circuit's decision as controlling law with regard to the principle that, so long as plaintiffs have an avenue available in which to proceed on their pay claims, which they clearly do under the grievance procedure, that route is the exclusive forum and judicial review is foreclosed, even though the pay claims are ultimately found to be non-negotiable, as they were here. Although this may appear to be a route without a remedy in this instance, the court feels the

decision herein is consonant with the holdings of the Harris and Carter cases, supra.

In their recent supplemental brief, plaintiffs' attempt to distinguish Carter, as reversed, is misplaced. Plaintiffs argue that Carter is distinguishable from this case because in Carter, the issue was whether plaintiffs had the option of pursuing their FLSA pay claims in district court, in addition to, or instead of, pursuing a remedy through the grievance procedure, and the court ruled that the grievance procedure provided the exclusive remedy. Plaintiffs argue that this case is different because unlike Carter, the parties here do not agree that plaintiffs' pay claims are a "grievance" under the grievance procedure. More correctly, it should be

noted plaintiffs do not agree but defendant does agree that Carter has significant impact on this case. Moreover, it is difficult not to view the matter as a grievance when plaintiffs took the matter through the grievance procedure to the highest administrative level. The court does not read the Federal Circuit's holding in its en banc reversal of Carter as turning on the fact that the parties agreed that plaintiffs' pay claims were grievable under the grievance procedure. Plaintiffs' attempt to distinguish Carter is, in essence, merely a reiteration of their argument that their pay claims are not subject to the grievance procedure. As discussed above, that issue has been resolved against them.

Although not cited by the

government, the Claims Court's decision in Skirlick v. United States, 17 Cl. Ct. 735 (1989), aff'd without opinion, No. 90-5011 (Fed. Cir. May 14, 1990), also supports the court's conclusion that it lacks jurisdiction to consider plaintiffs' pay claims. In Skirlick, the court followed the Harris rationale in holding that an air traffic controller's claim against the FAA for failure to transfer union dues, contrary to the terms of the collective bargaining agreement, was not subject to Claims Court jurisdiction since the employee had failed to pursue what the court found to be his exclusive remedy under the grievance procedure of his union's collective bargaining agreement. Skirlick, supra, 17 Cl. Ct. at 740-41.

CONCLUSION

In view of the foregoing

discussion, the court finds that, under the trilogy of cases relied on above, i.e., Harris, Carter as reversed en banc, and Skirlick, as affirmed without opinion, this court has no jurisdiction to hear plaintiffs' premium pay claims. The trilogy of cases all involved different factual situations, yet they all had one constant, the presence and availability of a collective bargaining agreement to resolve the grievance on which the claims were premised. That factor, present in this case, persuades the court that the holdings of the above trilogy of cases must be followed, as these cases reflect the current trend in this area of the law.

For the reasons set forth above, defendant's motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction is hereby

GRANTED. No costs.

/s/ Thomas J. Lydon
Thomas J. Lydon
Senior Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5137

EDDIE J. ADAMS,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

O R D E R

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

O R D E R

Before ARCHER, Circuit Judge, LOURIE, Circuit Judge, and RADER, Circuit Judge.

A petition for rehearing haveing been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue on December 8, 1992.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: December 1, 1992

by_____
Diane M. Frye
Chief Deputy Clerk

cc: MICHAEL J. TEDESCO
SHALOM BRILLIAN

ADAMS V US, 90-5137

5 U.S.C. 551(4);(5)

Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

5 U.S.C. 553

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal

authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary; or contrary to

the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants

or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Added Sept. t, 1966, P.L. 89-554, sec 1, 80 Stat. 383.)

SUPPLEMENTAL APPROPRIATIONS ACT OF 1982

P.L. 97-257

5 U.S.C. 5343

Wages for certain Corps of Engineers employees. Act Sept. 10, 1982, P.L. 97-257, Title I, Ch. V in part, 96 Stat. 832, provides: "Without regard to any other provision of law limiting the amounts payable to prevailing wage rate employees, United States Army Corps of Engineers employees paid from Corps of Engineers Special Power Rate Schedules shall be paid, beginning the effective date of such annual wage survey in the region after the date of enactment of this Act (enacted Sept. 10, 1982), wages as determined by the Department of Defense Wage Fixing Authority to be consistent with wages of the Department of Energy and the Department of the Interior employees performing similar work in the corresponding area whose wage rates are established in accordance with section 9(b) of Public Law 92-392

[note to this section] or section 704 of Public Law 95-454 [note to this section].".

5 U.S.C. 5343

Prevailing rate determinations; wage schedules; night differentials

(a) The pay of prevailing rate employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29 [29 USCS sec. 213(f)], the rates may not be less than the appropriate rates provided by section 206(a)(1) of title 29 [29 USCS sec. 206(a)(1)]. To carry out this subsection--

(1) the Office of Personnel Management shall define, as appropriate--

(A) with respect to prevailing rate employees other than prevailing rate employees under paragraphs (B) and (C) of section 5342(a)(2) of this

title [5 USCS sec. 5342(a)(2)], the boundaries of--

(i) individual local wage areas for prevailing rate employees having regular wage schedules and rates; and

(ii) wage areas for prevailing rate employees having special wage schedules and rates;

(B) with respect to prevailing rate employees under paragraphs (B) and (C) of section 5342(a)(2) of this title [5 USCS sec. 5342(a)(B) and (C)], the boundaries of--

(i) individual local wage areas for prevailing rate employees under such paragraphs having regular

wage schedules and rates
(but such boundaries
shall not extend beyond
the immediate locality in
which the particular
prevailing rate employees
are employed); and
(ii) wage areas for
prevailing rate employees
under such paragraphs
having special wage
schedules and rates;
(2) the Office of Personnel
Management shall designate a
lead agency for each wage
area;
(3) subject to paragraph (5)
of this subsection, and
subsections (c)(1)-(3) and (d)
of this section, a lead agency
shall conduct wage surveys,
analyze wage survey data, and

develop and establish appropriate wage schedules and rates for prevailing rate employees;

(4) the head of each agency having prevailing rate employees in a wage area shall apply, to the prevailing rate employees of that agency in that area, the wage schedules and rates established by the lead agnecy, or by the Office of Personnel Management, as appropriate, for prevailing rate employees in that area; and

(5) the Office of Personnel Management shall establish wage schedules and rates for prevailing rate employees who are United States citizens employed in any area which is

outside the several States, the District of Columbia, the Commonwealth of Puerto Rico, the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements (as described in section 3(a) of the Panama Canal Act of 1979 [22 USCS sec. 3602(a)])[.], the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(b) The Office of Personnel Management shall schedule full-scale wage surveys every 2 years and shall schedule interim surveys to be conducted between each 2 consecutive full-scale wage surveys. The Office may schedule more frequent

surveys when conditions so suggest.

(c) The Office of Personnel Management, by regulation, shall prescribe practices and procedures for conducting wage surveys, analyzing wage survey data, developing and establishing wage schedules and rates, and administering the prevailing rate system. The regulations shall provide--

(1) that, subject to subsection (d) of this section, wages surveyed be those paid by private employers in the wage area for similar work performed by regular full-time employees, except that, for prevailing rate employees under paragraphs (B) and (C) of section 5342(a)(2) of this title [5 USCS sec. 5342(a)(2)(B) and (C)], the wages surveyed shall be those paid by private employers to full-time employees in a representative

number of retail, wholesale, service, and recreational establishments similar to those in which such prevailing rate employees are employed;

(2) for participation at all levels by representatives of organizations accorded rcognition as the representatives of prevailing rate employees in every phase of providing an equitable system for fixing and adjusting the rates of pay for prevailing rate employees, including the planning of the surveys, the drafting of specifications, the selection of data collectors, the collection- and the analysis of the data, and the submission of recommendations to the head of the lead agency for wage schedules and rates and for special wage schedules and rates

where appropriate;

(3) for requirements for the accomplishment of wage surveys and for the development of wage schedules and rates for prevailing rate employees, including, but not limited to--

(A) nonsupervisory and supervisory prevailing rate employees paid under regular wage schedules and rates;

(B) nonsupervisory and supervisory prevailing rate employees paid under special wage schedules and rates; and

(C) nonsupervisory and supervisory prevailing rate employees described under paragraphs (B) and (C) of section 5342(a)(2) of this title [5 USCS sec. 5342(a)(2)(B) and (C)];

(4) for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or unusually severe hazards;

(5) rules governing the administration of pay for individual employees on appointment, transfer, promotion, demotion, and other similar changes in employment status; and

(6) for a continuing program of maintenance and improvement designed to keep the prevailing rate system fully abreast of changing conditions, practices, and techniques both in and out of the Government of the United States.

(d) (1) A lead agency, in making a wage survey, shall determine whether there exists in the local wage area a number of comparable positions in

private industry sufficient to establish wage schedules and rates for the principal types of positions for which the survey is made. The determination shall be in writing and shall take into consideration all relevant evidence, including evidence submitted by employee organizations recognized as representative of prevailing rate employees in that area.

(2) When a lead agency determines that there is a number of comparable positions in private industry insuficient to establish the wage schedules and rates, such agency shall establish those schedules and rates on the basis of--

(A) local private industry

rates; and

(B) rates paid for comparable positions in private industry in the nearest wage area that such agency determines is most similar in the nature of its population, employment, manpower, and industry to the local wage area for which the wage survey is being made.

(e) (1) Each grade of a regular wage schedule for nonsupervisor prevailing rate employees shall have 5 steps with--

(A) the first step at 96 percent of the prevailing rate;

(B) the second step at 100 percent of the prevailing rate;

(C) the third step at 104 percent of the prevailing

rate;

(D) the fourth step at 108 percent of the prevailing rate; and

(E) the fifth step at 112 percent of the prevailing rate.

(2) A prevailing rate employee under a regular wage schedule who has a work performance rating of satisfactory or better, as determined by the head of the agency, shall advance automatically to the next higher step within the grade at the beginning of the first applicable pay period following his completion of--

(A) 26 calendar weeks of service in step 1;

(B) 78 calendar weeks of service in step 2; and

(C) 104 calendar weeks of

service in each of steps 3 and 4.

(3) Under regulations prescribed by the Office of Personnel Management, the benefits of successive step increases shall be preserved for prevailing rate employees under a regular wage schedule whose continuous service is interrupted in the public interest by service with the armed forces or by service in essential non-Government civilian employment during a period of war or national emergency.

(4) Supervisory wage schedules and special wage schedules authorized under subsection (c)(3) of this section may have single or multiple rates or steps according to prevailing practices in the industry on which the schedule is based.

(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential--

(1) amounting to 7 1/2 percent of that scheduled rate for rgularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

A night differential under this subsection is a part of basic pay. (Sept. 6, 1966, P.L. 89-554, sec. 1,80 Stat. 471; Aug. 19, 1972, P.L. 9-2392 sec. 1(a); 86 Stat. 566; Oct. 13 1978, P.L. 95-454, Title IX, sec. 906(a)(2),(3), 92 Stat. 1224; Sept. 27, 1979, P.L. 96-70, Title III, Ch 3, sec.

3302(e)(10), 93 Stat. 498.)

5 U.S.C. 7103

Definitions; application

(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or

misapplication of any law, rule, or regulation affecting conditions of employment;

5 U.S.C. 7121

Grievance procedures

(a) (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that--

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assur such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may

be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title [5 USCS secs. 7321 et seq.] (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title [5 USCS sec. 7532];

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title [5 USCS sec. 2302(b)(1)] which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exrcised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems

Protection Board to review the final decision pursuant to section 7702 of this title [5 USCS sec. 7702] in the cae of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e) (1) Matters covered under sections 4303 and 7512 of this title [5 USCS secs. 4303, 7512] which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title [5 USCS sec. 7701] or under the negotiated

grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter [5 USCS secs. 7701 et seq.] may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions

of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title [5 USCS secs. 4303, 7512] which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title [5 USCS sec. 7701(c)(1)], as applicable.

(f) In matters covered under sections 4303 and 7512 of this title [5 USCS secs. 4303, 7512] which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title [5 USCS sec. 7703] pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same

conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title [5 USCS secs. 4303, 7512] which arise under other personnel systems and which an aggrieved employee has raised under the negotiatied (sic.) grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(Added Oct. 13, 1978, P. L. 95-454, Title VII, sec. 701, 92 Stat. 1211.)

5 U.S.C. 1491

Claims against United States generally; actions involving Tennessee Valley Authority

(a) (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution [USCS, Constitution], or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Airforce Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of

the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) to provide an entire remedy and to complete the relief afforded by the judgmen, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The

Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS sec. 609(a)(1)].

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court

jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 [16 USCS secs. 831 et seq.] with respect to actions by or against the Authority. (June 25, 1948, ch 646, sec. 1, 62 Stat. 940; July 28, 1953, ch 253, sec. 7, 67 Stat. 226; Sept. 3, 1954, ch 1263 sec. 44(a), 68 Stat. 1241; July 23, 1970, P. L. 91-350, sec. 1(b), 84 Stat. 449; Aug. 29, 1972, P.L. 92-415, sec. 1, 86 Stat. 652; Nov. 1, 1978, P.L. 95-563, sec. 14(i), 92 Stat, 2391; Oct. 10, 1980, P.L. 96-417, Title V, sec. 509, 94 Stat. 1743; Apr. 2, 1982, P.L. 97-164, Title I, Part A, sec. 133(a), 96 Stat. 39.)